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No. 00-1609

IN THE

Supreme Court of the United States

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the University of Texas School of Law's 1992 admissions policy, in which it discriminated on the basis of race, was nevertheless justified in order to remedy the effects of past societal discrimination in the State of Texas or to achieve racial diversity.

2.a. Whether the Fifth Circuit's 1996 holding in this case is now appropriate for review in this Court; and

2.b. Whether the district court's award of attorneys' fees was reasonable in light of the Fifth Circuit's 1996 decision.

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BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

Respondents Cheryl J. Hopwood and Douglas W. Carvell ("respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

This marks the second time in five years that petitioners have asked this Court to issue an advisory opinion, addressing petitioners' use in 1992 of race-based decisionmaking in law school admissions in order to secure "target" numbers of African American and Mexican American enrollees. This Court denied a substantially similar petition for certiorari in this case in 1996. Nonetheless, petitioners again ask this Court to review the circuit court's 1996 opinion by resurrecting and repackaging the same, stale arguments that this Court considered in denying certiorari in 1996.

In 1996, two Members of this Court offered their views of the fatal flaws in this case that make it inappropriate for this Court's review: "petitioners do not defend [the 1992 admissions policy] in this Court" and the Court "must await a final judgment on *a program genuinely in controversy* before addressing" the issue of racial preferences in higher education admissions. *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting the denial of the petition for certiorari; joined by Souter, J.) (emphasis added). Despite this caution from two Justices, petitioners stubbornly ignore what is plain: there is still no such "program genuinely in controversy" in this case. Nothing that has taken place since this Court's 1996 denial of certiorari has altered the then-existing deficiencies in the petition and in the underlying record, nor rendered this case worthy of review by this Court now. *See id.* (quoting from petitioners' 1996 Reply, which "'concede[d]'" that the "'record is inadequate to assess definitively' the constitutionality

of the law school's current consideration of race in its admissions process").[1]

Following this Court's denial of certiorari in 1996, the parties returned to the district court, as required by the Fifth Circuit's 1996 decision. In light of that decision's clear statement of the law, and the Fifth Circuit's faith that petitioners would adhere to the law, respondents did not seek a Rule 65 injunction on remand, and the proceedings during the remand trial were limited solely to issues of causation and money damages arising out of the 1992 admissions process, and the amount of respondents' attorneys' fees. Accordingly, while respondents do not dispute that preventing public universities from applying unconstitutional, racially discriminatory admissions policies is an issue of national importance, this case continues to be an inadequate and improper vehicle for this Court to address that issue.

STATEMENT

A. The Unconstitutionality Of The Law School's 1992 Admissions Policy

All agree that no system of *de jure* discrimination has existed in the State of Texas for more than fifty years and no form of racial discrimination—other than the preferences in admissions for African Americans and Mexican Americans—has existed at the law school since the 1960s. Pet. App. 116a; 6a.

It is equally undisputed that the law school's 1992 admissions policy—the subject of this litigation—unconstitutionally discriminated against respondents on the basis of race. *See* Pet. App. 67a (district court holding policy unconstitutional); Pet. 6 (petitioners acknowledging that they declined to appeal that ruling); Pet. App. 136a (court of appeals confirming that admissions

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[1] Copies of petitioners' 1996 petition and reply brief have been lodged with the Court.

program was unconstitutional).[2] That policy gave favored treatment to two and only two racially preferred groups, African Americans and Mexican Americans.[3] The preferential treatment was not limited to those applicants who were residents of Texas; nor was it limited to those students who had attended public school in Texas. *Id.* at 19a n.22; 112a.

Applicants from the two preferred groups were specially reviewed by a separate "minority" subcommittee charged with the goal of "'recommend[ing] sufficient candidates for admission to achieve a class that was 5% Black and 10% [Mexican American].'" *Id.* at 17a. The results of this system were "virtually indistinguishable from quotas." *Id.* at 146a-147a (Wiener, J., concurring). Admissions standards for these two preferred minority groups were substantially lower and often played a determinative role in admissions decisions.

Indeed, under the Texas Index system used to sort applicants, the district court found that "the presumptive *denial* score for nonminorities was *higher* than the presumptive *admission* score for minorities." *Id.* at 21a (emphases added). The law school also segregated applications in other ways, including color-coding them according to the applicant's race. *Id.* at 81a. Those applicants that fell into a discretionary admit category

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[2] Contrary to petitioners' suggestion that the law school was directed by the Department of Education's Office for Civil Rights to establish the unconstitutional admissions policy, Pet. 4, the district court specifically found in 1994 that the law school "voluntarily" adopted its race-driven system, Pet. App. 36a n.53, and the court of appeals reiterated this finding in 1996, *id.* at 119a.

[3] The law school's unconstitutional admissions policy thus did not purport to apply to all "minorities," and other racially identifiable minority groups, such as Native Americans or Cuban Americans, did not benefit from any special consideration.

were evaluated under separate procedures, and by separate admissions committees, based on their race. *Id.* at 21a-22a.

B. Proceedings Below

Hopwood A[4]

Respondents were residents of the State of Texas who did not belong to either of the two preferred racial groups and who were denied admission to the law school in 1992.

The district court concluded in 1994 that the law school unlawfully discriminated against respondents on the basis of their race. Despite the district court's view that petitioners could justify their use of racial preferences in admissions in order to remedy past discrimination in Texas's educational system and to achieve diversity, it held that the 1992 policy "was not narrowly tailored" to meeting those objectives because of the "separate evaluative processes" employed for preferred and nonpreferred racial groups. *Id.* at 58a-60a, 67a.

Although the district court declared that petitioners violated respondents' constitutional rights to equal treatment, it declined to order respondents' admission to the law school or to issue prospective injunctive relief because the law school had changed its admissions policy since the time the suit had been brought and—significantly—there was no "evidence of the practical application of the new procedure . . . before" the court. *Id.* at 67a-68a. Instead, the court ordered that respondents could reapply to the law school without further charge. The court also awarded respondents nominal damages of one dollar each, in recognition of "the gravity of the noneconomic injury to persons denied equal

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[4] Respondents will use the same terms used by petitioners to refer to the opinions in the lower courts. Pet. 2.

treatment" and "the importance to organized society that those rights be scrupulously observed." *Id.* at 69a.[5]

Hopwood II

Petitioners did not appeal the 1994 *Hopwood A* holding that they had violated respondents' constitutional rights.

Respondents, however, appealed the district court's failure to award further individual relief and its holding that racial preferences could be used to achieve "diversity" or to address past societal discrimination. The court of appeals, following this Court's precedents, reversed the district court in these respects and provided a clear statement of the relevant legal principles governing the use of racial preferences in law school admissions. Specifically, the court of appeals held that the Constitution precluded the use of race as a factor in admissions for the purpose of

> (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.

Id. at 129a. The court also concluded in 1996 that, in light of its clear holding and its belief that petitioners would adhere to the law, it was not necessary "to order at this time that the law school be enjoined." *Id.*

In addition, the court of appeals held that the district court had improperly assigned the burden of proof to re-

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[5] Petitioners now seek to minimize the district court's ruling as merely "invalidat[ing] certain details of the law school's 1992 admissions program," Pet. 6, but it cannot be disputed that the district court held that petitioners' program violated the Fourteenth Amendment to the Constitution of the United States. Pet. App. 59a-60a.

spondents on the issue of whether they would have been admitted to the law school under a constitutional admissions policy. Consequently, the court of appeals remanded the case to the district court for a determination of whether respondents were entitled to additional individual relief (i.e., money damages and/or an order of immediate admission to the law school) under a proper application of the burden of proof. *Id.* at 125a-126a.

Finally, in a separate order, the court of appeals vacated the district court's denial of respondents' requested attorneys' fees and instructed the district court to award respondents their reasonable attorneys' fees on remand. *Id.* at 309a n.81.

This Court's 1996 Denial of Certiorari

Petitioners sought review of the *Hopwood II* decision in this Court, and that petition was denied on July 1, 1996. Justice Ginsburg, joined by Justice Souter, provided an opinion concerning the denial, in which she explained that given petitioners' disavowal of the 1992 admissions policy's constitutionality and the fact that no other policy was "genuinely in controversy," this Court's review was unwarranted. *Texas v. Hopwood*, 518 U.S. at 1034.

Hopwood B

On remand, the district court heard evidence concerning whether respondents would have been admitted under a constitutional admissions system and the amount of respondents' money damages caused by the discriminatory admissions system and the passage of time. No evidence was presented whether, following the circuit court's clear statement of the law concerning the use of race in admissions, an injunction should be entered against the law school.

The district court determined that respondents would not have gained admission to the law school in 1992 even if the law school had employed a policy that

did not unlawfully discriminate on the basis of race. The district court also considered, as instructed by the court of appeals, the proper amount of attorneys' fees to award respondents. Pet. App. 309a n.81. Although it substantially reduced the requested attorneys' fees, the district court found that respondents "attained extraordinary success" and "accomplished the principal goal of the lawsuit," and it awarded $775,760.31 in fees and costs. *Id.* at 252a. The court reaffirmed its award of one dollar each in nominal damages, but awarded respondents no additional money damages.

Finally, the district court *sua sponte* entered a broadly worded injunction against the law school, Pet. App. 270a, despite the Fifth Circuit's conclusion that an injunction was not necessary and the fact that respondents did not renew their request for an injunction against the law school on remand. The district court made no factual findings to support its injunction, as required by Federal Rule of Civil Procedure 52(a).

Hopwood III

Both sides appealed the district court's rulings. Although petitioners sought en banc review in the first instance, the court of appeals rejected their petition and the case was heard by a three-judge panel. In an opinion issued by Judges Wiener and Stewart, and joined by Judge Little sitting by designation, the court of appeals affirmed the district court's finding that respondents would not have been admitted to the law school under a race-blind admissions policy and affirmed the district court's award of attorneys' fees, concluding that the fee award was legally justified under this Court's precedents and the amount awarded was not an abuse of discretion. Pet. App. 298a, 310a-311a, 317a. The court applied the law-of-the-case doctrine and rejected petitioners' argument that the constitutional issues decided in *Hopwood II* were wrongly decided. The court also reiterated that the *Hopwood II* decision was consistent with *Regents of*

the Univ. of California v. Bakke, 438 U.S. 265 (1978), and that nothing in *Hopwood II* conflicted with any controlling precedent from this Court. Pet. App. 301a, 305a.

Finally, the court of appeals reversed the district court's *sua sponte* injunction because it lacked any supporting factual findings or conclusions of law *and* because the district court's injunction was in square conflict with this Court's holding in *Bakke*. Pet. App. 306a-307a.[6]

Both sides petitioned for rehearing en banc. Both petitions were denied on January 17, 2001.

REASONS FOR DENYING THE WRIT

A. This Case Is Less Appropriate For Review Today Than It Was Five Years Ago

Five years ago, petitioners asked this Court to review six questions allegedly raised by *Hopwood II*. This Court declined to grant certiorari. Today, petitioners return to "challenge the judgment of the court of appeals reaffirming [that] court's [1996] 'judicial instruction.'" Pet. 23. Petitioners present questions that, fundamentally, are simply repackaged versions of the questions presented in their prior petition.[7]

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[6] Respondents did not defend the *sua sponte* injunction on appeal because (i) respondents concurred with the circuit courts' view in *Hopwood II* that an injunction was not necessary given that decision's clear guidance, (ii) the district court's injunction was inconsistent with this Court's holding in *Bakke*, and (iii) the injunction indisputably lacked the factual findings required by Rule 52(a). Simply put, the *sua sponte* injunction was indefensible.

[7] The only even arguably new issue that petitioners present is whether the district court's award of attorneys' fees was proper. As the court of appeals noted in affirming that award, respondents were plainly entitled to attorneys' fees as

Petitioners again rely on their claim that the *Hopwood II* panel erred in its 1996 determination that the law school violated the Constitution in its use of racial classifications in admissions decisions.[8] Petitioners do not contend that there has been an intervening change in the relevant law since 1996. Instead, the centerpiece of petitioners' arguments continues to be their patently incorrect assertion that the *Hopwood II* decision is somehow in direct conflict with *Bakke*. *Compare* Pet. 9-10 *with* 1996 Pet. 12-13. As discussed in more detail below, however, the circuit court's decision was fully consistent with what petitioners acknowledge is the holding in *Bakke*, and that fact has remained unchanged since 1996. Pet. 9; *see infra*.

Petitioners also attempt to justify the need for this Court's review by arguing that *Hopwood II*'s holding conflicts with this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *United States v. Fordice*, 505 U.S. 717 (1992). Pet. 14-16. Both of these decisions were well established in 1996 when petitioners first sought this Court's review, and petitioners made essentially identical arguments then—indeed, petitioners included a specific "question" directed to the *Fordice* opinion in their prior petition. *See*

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a matter of law, and the district court did not abuse its discretion in determining the amount of fees to award. *See infra*.

[8] Petitioners complain that *they* are frustrated with the duration of this litigation. *See* Pet. 22 ("It has taken this case nine years to get here."). It is *respondents* whose constitutional rights were violated, and whose lives and careers have been disrupted and delayed while petitioners attempt at every turn to re-litigate the issues they lost in 1996. That Texas—having *admitted* it unlawfully discriminated against respondents on the basis of race—still seeks to postpone the individual relief awarded to respondents is striking and offensive. And in any event, of course, it took *four* years for this case "to get here" and this Court denied certiorari at that time.

1996 Pet. 16-17, 20-21. As described more fully below, the 1996 *Hopwood II* decision was (and continues to be) fully in accord with *Croson* and *Fordice*.

Petitioners seek to manufacture a "new" issue by suggesting that in 1996 this Court misunderstood the nature of *Hopwood II*'s so-called "judicial instruction" in which it stated the clear rule of law as to when racial classifications in an admissions system could and could not be constitutionally employed. Pet. 29 (this Court "had every reason to expect that either the judgment below had not attempted to grant prospective relief or that, if it had, the courts below would promptly embody that prospective relief in a properly appealable injunction or declaratory judgment"). Petitioners' effort misses the mark entirely.

The *Hopwood II* court could not have been more clear in its view that a formal injunction was unnecessary. Pet. App. 129a ("It is not necessary . . . for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the [law] school, as well as its attorneys, will heed the directives contained in this opinion."). Thus, in 1996 there was *no reason* (not petitioners' "every reason" (Pet. 29)) for this Court to believe that a Rule 65 injunction would be forthcoming from the courts below. Moreover, however petitioners may characterize the "judicial instruction," they clearly understand it and have been complying with it. Pet. 24 (noting that petitioners "have complied [with *Hopwood II*] for five years and will continue to do so" unless that decision is overturned or superseded).

As petitioners elsewhere recognize, the *Hopwood II* opinion contained "a clear directive from the federal courts," Pet. 22, that was "stated, three times, with all the precision of an injunction or declaratory judgment." *Id.* at 24. Presumably, this Court considered that "clear," "precise," and thrice-stated "directive" in 1996. Petitioners now concede that the circuit court's 1996 de-

cision clearly stated the law and they assert that the "judicial instruction" is reviewable by this Court. *Id.* at 22, 26. Of course, the 1996 "judicial instruction" has not suddenly become reviewable; the *Hopwood II* decision was fully reviewable in 1996.

The driving force behind petitioners' claim that this Court misunderstood the *Hopwood II* decision seems to be petitioners' interpretation of Justice Ginsburg's opinion regarding the denial of certiorari in 1996. Pet. 22; *Texas v. Hopwood*, 518 U.S. 1033 (1996). Apparently, petitioners are of the view that this Court denied certiorari in this case in 1996 because the "judicial instruction" was not in the form of an injunction.[9] Respondents are reluctant to over-interpret the one-paragraph opinion provided by Justices Ginsburg and Souter. Nonetheless, the crux of that opinion is that review was inappropriate because there was no admissions policy in controversy. *See id.* at 1034 (stating that the Court "must await a final judgment on a program genuinely in controversy"); *see also id.* (quoting from petitioners' 1996 Reply to explain that "'[a]ll concede this record is inadequate to assess definitively' the constitutionality of the law school's current consideration of race in its admissions process"). The record on this point is no different now than it was in 1996; there remains no evidence concerning any admissions policy other than the abandoned 1992 system.

Finally, petitioners invoke the development of cases in other circuits that address the question of using racial preferences in higher education admissions. Despite petitioners' protestations to the contrary, those cases appear to be better candidates for this Court's considera-

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[9] As petitioners themselves acknowledge, however, "this Court has recognized that form is not dispositive, and that orders with all the practical consequences of an injunction will support appellate jurisdiction." Pet. 26 (citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981)).

tion of the use of race in admissions decisions—should review be deemed appropriate at all—and those cases' emergence in the years since this Court denied petitioners' prior petition offers no reason for granting their flawed petition now. Most fundamentally, these other cases—unlike this case—have live controversies over specific admissions policies. In *Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3593 (U.S. Feb. 21, 2001) (No. 00-1341), for example, there remains an ongoing controversy over the admissions policy at issue and the law school continues to defend that policy. The announcement of decisions in *Smith* and other cases in the last several months may have brought the issue of racial preferences in admissions to the fore, but that in no way supports granting review of *this* case.[10]

In sum, nothing that has transpired in the last five years makes this case any more worthy of this Court's review now than it was in 1996. To the contrary, laws enacted by the Texas Legislature since 1996 addressing admissions procedures have made this case *even less* appropriate for review.[11]

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[10] On pages 18 through 20 of their brief, petitioners make a host of unsubstantiated assertions about matters that are wholly outside of the record in this case, including the contention that because minority students who "approach or approximate but do not exceed the ever-rising threshold for admission" to the law school are not being admitted, "the pursuit of academic excellence" has been "abandon[ed]." Pet. 18, 20. None of these baseless assertions has ever been reviewed by a court.

[11] According to petitioners, the legislature "responded to *Hopwood II*" by guaranteeing admission to any Texas public university to those Texas high school students who graduate in the top 10% of their class and by directing Texas universities to consider many admission factors, which petitioners believe act as "proxies" for racial diversity. Pet. 19.

B. The Decision Below Does Not Conflict With Any Of This Court's Decisions

1. The Court Of Appeals Was Faithful To The Holding In *Bakke*

Petitioners grossly misconstrue this Court's holding in *Bakke*, the Fifth Circuit's interpretations of *Bakke*, and its holdings in this case.

As they did in 1996, petitioners begin by properly quoting, in its entirety, the only paragraph from *Bakke*'s equal protection analysis that garnered five votes:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Pet. 9 (citing *Bakke*, 438 U.S. at 320 (Part V-C of the opinion of Powell, J.) and *id.* at 328 (opinion of Brennan, J., concurring in Part V-C along with three others)); 1996 Pet. 12-13. Petitioners acknowledge that these two sentences are "the holding in *Bakke*." Pet. 9.

Shortly after recognizing the "holding" of *Bakke*, however, petitioners engage in a classic sleight of hand and condemn the court of appeals for failing to follow the various "rationales" presented in *Bakke*, Pet. 9, and for "reject[ing] *Bakke*'s authority as law." *Id.* at 10. Arguing that *Bakke* dictates that diversity in higher education is a compelling government interest, petitioners attack the *Hopwood II* opinion as inconsistent with this notion. Throughout their discussion of *Bakke*'s diversity rationale, however, petitioners are unable to cite to *Bakke* to support their argument, opting instead to cite

lower court cases discussing Justice Powell's lone opinion on the diversity rationale. *Id.* at 10-13.

Of course, both the *Hopwood II* and the *Hopwood III* panels fully conformed to "the holding" in *Bakke*. *Id.* at 9. Contrary to petitioners' repeated distortions, the court of appeals has not held that race could never be considered in admissions. *Id.* Instead, the *Hopwood II* court considered the four justifications that the law school proffered for its use of racial classifications in admissions and concluded that none of them was constitutionally adequate to justify the racially discriminatory practices being employed. Pet. App. 136a. As the circuit court's discussion indicates, however, it did not foreclose the use of race in all conceivable situations, and in fact noted that if the law school itself had engaged in past discrimination, the effects of which were presently being felt, the law school could be justified in remedying its own prior conduct. *Id.* at 114a.[12]

Were there any doubt about the Fifth Circuit's faithfulness to *Bakke*, the *Hopwood III* court's explicit denunciation of the district court's overly broad *sua sponte* injunction should lay that doubt to rest. Although petitioners state that reversal of the injunction was "primarily on procedural grounds," Pet. 8, the Fifth Circuit was quite clear that: "On its face, the district court's injunction impermissibly conflicts with the square holding in *Bakke*." Pet. App. 307a.

Petitioners spin their incorrect assertion that the court of appeals rejected *Bakke* as authoritative law, into the quite separate argument that other courts have em-

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12 Petitioners contradict themselves on this point by asserting that the court of appeals imposed a "blanket prohibition of any consideration of race in admissions," Pet. 9, but recognizing two pages later that "the Fifth Circuit[] [held] that consideration of race is limited to remedial interests." *Id.* at 11.

braced Justice Powell's diversity rationale. *Id.* at 11-13. But as even petitioners acknowledge, most courts that have considered the diversity rationale have simply adopted the approach that Judge Wiener took in his *Hopwood II* concurrence, and assumed *arguendo* that diversity could be a compelling interest before striking down a racial preference system on other grounds. *See, e.g., Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 130 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998). These courts thus did not endorse the reasoning that petitioners press in their brief, i.e., that *Bakke* requires the conclusion that diversity is a compelling interest.

The *only* cases that petitioners cite to support their position that diversity is a compelling interest are *Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3593 (U.S. Feb. 21, 2001) (No. 00-1341), and *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). And only the *Smith* court concluded—erroneously—that *Bakke* somehow mandated that conclusion. *Compare Smith*, 233 F.3d at 1200 (stitching together its conclusion with the hypothesis that Justice Brennan (and Justices White, Marshall, and Blackmun) "would have embraced [the diversity rationale] if need be") *with Gratz*, 122 F. Supp. 2d at 819, 822 ("It is clear that no five Justices in *Bakke* expressly held that diversity was a compelling interest under the Equal Protection Clause"; but nonetheless concluding that Supreme Court precedent does not "bar[]" finding that diversity could be compelling).

Without resorting to the type of guesswork that the Ninth Circuit undertook in *Smith*, the conclusion that the Fifth Circuit's decision is somehow in "conflict with *Bakke*," as petitioners state, is erroneous. Pet. 9. As petitioners' quotation of "the holding" of *Bakke* makes clear, Justice Powell's diversity rationale is not included

in Part V-C of the *Bakke* decision, and thus is not binding precedent.

Moreover, even Justice Powell's view of diversity was far more complex than the simplistic, race-based approach that the law school embraced in its 1992 admissions policy. Justice Powell's opinion did not state that adding a target number of students from minority ethnic groups would satisfy the state's high burden in justifying the use of racially discriminatory admissions practices. Rather, he stated that an "admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307. Yet the law school's use of racial preferences had the sole result of increasing "facial diversity" not "true diversity," Pet. App. 147a (Wiener, J., concurring), and thus did not conform even to Justice Powell's concept of diversity.

Finally, no other decision from this Court has found diversity to be a compelling state interest under strict scrutiny analysis.[13] Indeed, as four Members of this Court have expressly stated: "Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting), *overruled by, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227

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[13] In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), this Court applied intermediate scrutiny in determining that diversity in the ownership of broadcasting facilities is an "important governmental objective." *Id.* at 567-68. *Metro Broadcasting*'s use of intermediate scrutiny was expressly overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

(1995); *see also Croson*, 488 U.S. at 507 (rejecting "outright racial balancing" as a compelling interest).[14]

The Fifth Circuit's decision not to embrace Justice Powell's singular views regarding the strength of a "diversity" interest in higher education was entirely in keeping with *Bakke*'s holding and with subsequent decisions of this Court.

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[14] Petitioners occasionally argue that this Court's precedent regarding racial preferences from outside the context of education has no relevance for this case, and that *Bakke* is the only pertinent decision. *E.g.*, Pet. 12 (attacking court of appeals for having relied on cases that "say next to nothing about education"); *id.* at 13 (court of appeals "inappropriately and bluntly applied th[is] Court's conclusions" from public contract cases). That position is inconsistent with petitioners' own claim at the outset of their petition that review of this case is justified because of the importance of these issues "to the larger arena of the States' use of racial classifications" outside public education. *Id.* at 2. Moreover, this Court has emphasized the consistency and continuity of the Court's equal protection analysis in this area. In *Adarand*—a decision not cited by petitioners—this Court traced the treatment of the issue from the 1940s "through *Croson*" and emphasized that the same legal standard applies whatever the particular government policy at issue. *See Adarand*, 515 U.S. at 214-27. This Court's analysis has never sought to isolate the principles announced in a case involving higher education from the principles announced in a case involving public contracts, or any other context. *See, e.g.*, *id.* at 214, 218-21 (analyzing *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Bakke*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), each of which involved a very different form of race-based governmental action).

2. The Court Of Appeals Properly Applied This Court's Precedents To Conclude That The Law School's Admissions Policy Was Not A Constitutional Means Of Remedying Past Discrimination

As in 1996, petitioners again appear to attack the circuit court's conclusion that the 1992 admissions policy was not justified on the grounds that it was remedying effects of past discrimination. Pet. 14-16; 1996 Pet. 16-20. The Fifth Circuit's conclusion was correct and entirely consistent with this Court's precedents.

Petitioners argue that the law school's admissions policy was justified by the State of Texas's discrimination in the students' "earlier years" in primary and secondary education. Pet. 14. This Court has rejected this very argument. *See Croson*, 488 U.S. at 499 (rejecting notion that "discrimination in primary and secondary schooling justifies" race preferences in professional school admissions). Any preferential treatment on the basis of race must be designed to remedy prior discrimination "by the governmental unit involved," i.e., the law school. *Wygant*, 476 U.S. at 274 (plurality opinion).[15] And, in any event, Texas did not narrowly tailor its racial preferences to students who were products of the Texas public school system.

Petitioners have also sought to justify the admissions program on the grounds that it will remedy "effects" of past discrimination such as the law school's "lingering reputation in the minority community . . . as a 'white' school" and "some perception that the law

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[15] For this reason, the court of appeals concluded that because petitioners' argument regarding the "underrepresentation" of minorities in the law school was tied to past discrimination by Texas's educational system as a whole—and not by the law school—it did not justify the law school's racially discriminatory practices. Pet. App. 117a-119a.

school is a hostile environment for minorities." Pet. App. 45a. As the court of appeals made clear, these effects are not attributable to the law school's past conduct, but rather result from "knowledge of historical fact" and present *societal* discrimination. *Id.* at 115a-117a. As this Court has explained, remedying the effects of "societal discrimination" is not a valid justification for racial classifications:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

Wygant, 476 U.S. at 274 (plurality opinion); *see id.* at 288 (O'Connor, J., concurring) ("I agree with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."); *see also Croson*, 488 U.S. at 498-99, 505.[16]

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[16] Petitioners' assertion that the *Hopwood III* decision conflicts with the "passive participant" reference by three Members of this Court in *Croson* is mistaken. Pet. 15-16. First, *Hopwood III* merely notes that the State never claimed that the University was ever a "passive participant" in either a private or public system of racial discrimination. Pet. App. 301a & n.61. Second, petitioners' interpretation stretches the passive participant reference so far as to conflict with *Croson* itself, which rejected the use of racial classifications to remedy societal discrimination. *See Croson*, 488 U.S. at 498-99, 505. The "passive participant" theory thus cannot be used to justify—as petitioners seem to suggest—government's attempts to remedy acts of private discrimination under the guise that it was a "passive participant" in allowing that private discrimination to take place. Indeed, such an approach

As in 1996, petitioners also invoke *United States v. Fordice*, 505 U.S. 717 (1992), to contend that the 1992 admissions policy was justified. Pet. 14-15; 1996 Pet. 20-21. According to petitioners, *Fordice* somehow dictates that the law school can remedy prior discrimination that it had no part in, but was solely attributable to the State of Texas. Pet. 14-15.

The premise of petitioners' argument is unfounded. In *Fordice*, this Court held that a State that had operated a dual system of higher education must "reform[] to the extent practicable and consistent with sound educational practices" those policies "*traceable*" to the *de jure* era of segregation. *Fordice*, 505 U.S. at 729 (emphasis added). Petitioners have failed to identify any law school admissions practice that is traceable to the *de jure* era in Texas education. In fact, the record makes clear that beginning in the 1960s petitioners employed admissions policies that granted preferences to minorities. Pet. App. 12a. There was thus a clean break with the *de jure* practices of the 1940s. Moreover, it is undisputed that neither the State of Texas nor the law school ever engaged in any discrimination against Mexican Americans in education.

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would transcend the limitation established by this Court's rejection of the "societal discrimination" rationale, and would have "no logical stopping point." *Croson*, 488 U.S. at 498; *see also Adarand*, 515 U.S. at 220-24 (citing with approval both *Wygant*'s clear rejection of the "societal discrimination" justification and the holding in *Croson*).

Id. at 122a n.50.[17] *Fordice*, thus, offers no support for petitioners.[18]

3. Contrary To Petitioners' Claim, This Case Is Not Uniquely Appropriate For Review

Petitioners attempt to distinguish this case from other cases in which the issue of racial preferences in admissions is more squarely in controversy, by arguing that this is the only case that involves both a diversity rationale and a remedial rationale for racial preferences.

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[17] The *Hopwood II* court concluded that "there is no dispute that the law school has never had an admissions policy that excluded Mexican Americans on the basis of race," and that "[w]hile the school once did practice *de jure* discrimination in denying admission to blacks" that practice ceased with this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950). Pet. App. 116a.

[18] Petitioners also cite a Second Circuit case, *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000), and claim that *Brewer* recognized a non-remedial justification for racial classifications as a compelling interest and thus conflicts with *Hopwood II*. Pet. 15. *Brewer* is not inconsistent with *Hopwood II* for several reasons. First, the *Brewer* court was not confronted with either diversity or remedying effects of past discrimination as purported justifications for racial classifications. The court expressly noted that *Bakke* and its various rationales are "not directly on point." *Brewer*, 212 F.3d at 751. Second, the factor that led the *Brewer* court to conclude that combating *de facto* segregation could be a compelling interest was that it felt constrained by its own prior case law that had never been overruled. *See Brewer*, 212 F.3d at 752. Finally, after reviewing this Court's decisions in *Croson* and *Wygant*, the Second Circuit expressly stated that "Supreme Court precedent, admittedly, provides fairly strong support for the District Court's conclusion that there is no compelling interest in the Program here." *Id.* at 748. All of these distinguishing characteristics limit *Brewer*, at most, to its particular setting.

Pet. 21-22. That assertion is inaccurate and petitioners' reasoning is unconvincing in any event.

As an initial matter, this is not the only case that presents both a "remedy" and a "diversity" rationale. Petitioners recognize, but seek to gloss over, the *Grutter* and *Gratz* cases currently pending in the Sixth Circuit. Pet. 21 n.2. In both of these cases, defendants and intervenors have attempted to justify racially discriminatory admissions policies at the University of Michigan and its law school on the grounds that the policies are intended to achieve diversity *and* to remedy present effects of past discrimination. *See Grutter v. Bollinger*, 2001 U.S. Dist. LEXIS 3256, at *85, *139-*142 (E.D. Mich. Mar. 27, 2001) (rejecting both the University of Michigan Law School's diversity justification and defendant-intervenors' remedial justification); *Gratz v. Bollinger*, 2001 U.S. Dist. LEXIS 4457, at *29 (E.D. Mich. Feb. 26, 2001) (rejecting defendant-intervenors' remedial justification); *Gratz*, 122 F. Supp. 2d at 816 (addressing University's diversity rationale).

In *Grutter*, the court's description of the flaw in intervenors' argument is quite similar to one of the flaws that the *Hopwood II* court discerned in this case: the "lower grades and test scores of underrepresented minorities is attributable, at least in part, to general, societal racial discrimination against these groups," but as a matter of constitutional law "the effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making." *Id.* at *140-*42; *cf.* Pet. App. 115a-118a. The *Gratz* court rejected similar arguments. *See Gratz*, 2001 U.S. Dist. LEXIS 4457, at *29 (concluding that alleged discrimination was at most attributable to "racial hostility on campus" and not to "the University itself"). That a law school cannot use race in admissions purportedly to remedy effects of "societal discrimination" is thus not a concept singularly recognized by the *Hopwood II* court.

In any event, the law school's 1992 admissions policy contained so many constitutional flaws that review in this Court of the questions raised by petitioners would amount only to an advisory opinion. As an initial matter, petitioners—as in 1996—do not defend the 1992 program. Moreover, even if this Court disagreed with the majority's opinion in *Hopwood II*, and found that the law school had asserted a compelling interest that could justify the use of racial classifications, the 1992 policy was plainly not narrowly tailored to achieving any such purported objective, and the *Hopwood II* decision could be affirmed on that separate and independent ground. As Judge Wiener noted in his 1996 concurrence, the remedial and non-remedial justifications that petitioners advanced for the admissions policy were inconsistent with one another. Pet. App. 146a n.24 (Wiener, J., concurring). The law school's asserted interest in remedying the effects of prior discrimination faces the obvious and insurmountable obstacle that there is no evidence of past *de jure* discrimination against Mexican Americans in the State of Texas let alone any discrimination by the law school. Pet. App. 121a-122a n.50. Despite the lack of any past discrimination, the admissions program employed by the law school had as its "goal" twice as many spots for Mexican Americans than for African Americans (who undoubtedly were discriminated against on a *de jure* basis until 50 years ago), thereby belying the assertion that the objective of the policy was to remedy past discrimination. *Id.*[19] The remedial basis is further

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[19] The *Hopwood II* majority similarly noted that, as a result, the policy would not appear narrowly tailored to, or even aimed at, achieving "a goal of remedying past discrimination." Pet. App. 121a-122a n.50. Thus, both the Fifth Circuit and the district court indicated that Texas failed the "narrow tailoring" prong of the strict scrutiny test. *See also Croson*, 488 U.S. at 506 (noting that the "inclusion of racial groups that, as a practical matter, may never have suffered from dis-

belied by the admissions policy's application of the racially preferential treatment to African Americans and Mexican Americans who never lived in the State of Texas or attended the public schools in that State. Meanwhile, by choosing to favor only two minority groups, "and doing so with a virtual quota system for affirmative action in admissions, the law school estops itself from proving that its plan to achieve diversity is ingenuous, much less narrowly tailored." Pet. App. 146a n.24 (Wiener, J., concurring). As noted above, under Justice Powell's *Bakke* opinion, the Texas program was "discrimination for its own sake." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Finally, whatever distinctions might be conjured up to highlight a particular aspect of the *Hopwood* decisions, the fact remains that—unlike some other cases cited by petitioners—there is no contested policy at issue. This case was plainly inappropriate for this Court's review in 1996 and that remains true today.

C. There Is Nothing Peculiar About The Holdings Of *Hopwood II* Or *Hopwood III* That Requires Further Review

1. *Hopwood II* Was Never Improperly "Insulated" From Further Review

Evidently concerned that their repetition of theories for review advanced in their 1996 petition continues to lack merit, petitioners offer a series of misguided assertions in the final pages of their petition. Pet. 26-29. Petitioners cite *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *City News & Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001), seemingly to contend that this case should be reviewed because the decisions below have previously been "insulated" from review by

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crimination . . . suggests that perhaps the . . . purpose was not in fact to remedy past discrimination").

this Court. Pet. 26-27. *City of Erie* and *City News & Novelty, Inc.*, however, stand for the simple proposition that when a party prevails in having a local ordinance struck down, that party's subsequent voluntary abandonment of its practices to which the ordinance was directed will not serve to moot the case and prevent review of the lower court's opinion. *See City of Erie*, 529 U.S. at 287-88 (fact that operator of nude dancing establishment had closed business would not moot the case); *City News & Novelty, Inc.*, 121 S. Ct. at 747. These mootness cases are inapposite here. Respondents have done nothing to attempt to moot this case, and indeed respondents vigorously contested portions of the district court's opinions in both *Hopwood II* and *Hopwood III*.[20]

Moreover, petitioners' arguments about the reviewability of this case rely on a misstatement of the facts. Petitioners are wrong when they assert that respondents "opposed any attempt to implement" *Hopwood II* with "a formal injunction" in order to render "more difficult any further review of the 'judicial instruction.'" Pet. 25. Rather, on remand after *Hopwood II*, respondents followed that court's guidance that an injunction was unnecessary in light of the clear statement of the law in *Hopwood II* and the belief that the law school would comply with the law. Respondents had no new evidence that the law school would not comply with the *Hopwood II* decision; accordingly, respondents did not renew their request for a Rule 65 injunction on remand. Indeed, both petitioners and respondents proceeded on remand with the understanding that the *only* issues remaining in this case were causation, additional individual relief for

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[20] Petitioners' half-hearted mootness argument predicated on *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) and *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), is equally misplaced because it is premised on the legal fiction that the constitutional issues decided in *Hopwood II* were not reviewable in 1996. Pet. 28-29.

respondents, and the amount of attorneys' fees. Respondents did not defend the district court's facially flawed *sua sponte* injunction in the court of appeals for the reasons discussed in note 6, *supra*. To be clear: respondents have not retreated from their position that the law school is bound by the *Hopwood II* decision.[21]

Nothing has improperly "insulated" this case from review. The issues petitioners present today were considered by this Court in 1996.[22]

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[21] Petitioners are also mistaken in their assertion that under this Court's per curiam opinion in *Texas v. Lesage*, 528 U.S. 18 (1999), respondents are not entitled to prospective relief (presumably meaning the law school's continued adherence to *Hopwood II*) unless they again seek a Rule 65 injunction from the district court. Contrary to petitioners' claim that *Lesage* impacts respondents' standing, Pet. 28, *Lesage* merely identified an affirmative defense to one kind of damages and does not consider standing at all. *See Lesage*, 528 U.S. at 21-22; *Wooden v. Bd. of Regents of the Univ. Sys. of Georgia*, 2001 U.S. App. LEXIS 7159, *41 (11th Cir. Apr. 19, 2001) (*Lesage* "does not refer to standing at all"). Moreover, unlike *Lesage*, respondents here achieved "forward-looking" relief from the court of appeals in 1996 inasmuch as the *Hopwood II* opinion has compelled the law school to adhere to a race-neutral admissions policy. *See* Pet. 22, 24. There is no constructive reason for respondents to pursue additional, and overlapping, injunctive relief that the court of appeals concluded in 1996 was unnecessary, particularly in light of petitioners' repeated statements that they are bound by, and will continue to adhere to, the judgment in *Hopwood II*. *See, e.g.*, Pet. 22, 24.

[22] The gravamen of petitioners' arguments is that they are generally unhappy with the *Hopwood II* decision—they never assert that the 1992 admissions program was constitutional. Of course, unhappiness with a decision does not by itself create an issue that is worthy of this Court's review. Indeed, respondents are quite unhappy with the manner in which the lower courts applied the burden shifting mechanism required by *Mt. Healthy City Sch. Dist. Bd. of Educ. v.*

2. Respondents' Receipt Of Attorneys' Fees Was Entirely Justified And Is Not A Basis To Support This Court's Review

In a confused discussion apparently designed to demonstrate that this Court's review is more appropriate today than it was in 1996, petitioners also insert a back-door challenge to the award of attorneys' fees. Pet. 25-26. Review of the lower court's award of attorneys' fees, in which it slashed respondents' requested fees by half and which the court of appeals affirmed, is wholly unwarranted. Petitioners' request for "summar[y] revers[al]," Pet. 30, in their petition is even more far-fetched. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 340 n.9 (1979) (noting that summary reversal is an "extraordinary action").

The fact remains that respondents are clearly entitled to the award of fees. In *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court explained that in order to qualify for attorneys' fees under 42 U.S.C. § 1988 one must be a prevailing party, that is "a civil rights plaintiff [who] obtain[ed] at least some relief on the merits of his claim." *Farrar*, 506 U.S. at 111. Notably, a plaintiff who recovers even nominal damages is deemed a prevailing party. *Id.* at 112. There can be no dispute that respondents are prevailing parties in this case, as they have continuously prevailed on their claim that petitioners violated their constitutional rights, they were granted the right to reapply at no further cost, they have further been awarded nominal damages for their injuries, and they induced the

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Doyle, 429 U.S. 274 (1977), in concluding that petitioners carried their burden of proving that none of the respondents would have been admitted to the law school under a constitutional admissions system. The court of appeals plainly erred in reaching that conclusion despite, among other things, numerous concessions by petitioners that the burden was "impossible" for them to carry.

law school to change its admissions policy. Pet. App. 68a-69a; *id.* at 309a, 309a nn.80 & 81. Respondents attained all of this relief from the district court in 1994 (or prior to its ruling), and petitioners *did not appeal* that decision. Thus, petitioners were prevailing parties even before the *Hopwood II* decision, which afforded respondents additional relief by ensuring that any future application submitted to the law school (by respondents or others) would be reviewed under a constitutional race-neutral process.

Once prevailing party status is established, the only remaining question is the reasonable amount of attorneys' fees to award. Under § 1988, the district court is entitled considerable leeway in determining "in its discretion" where to set the level of attorneys' fees. *See* 42 U.S.C. § 1988(b); *Farrar*, 506 U.S. at 119 (O'Connor, J., concurring). In this case, the district court recognized, and petitioners have confirmed, that respondents "accomplished the principal goal of the lawsuit" in precipitating a change in the law school's admissions policy. Pet. App. 252a; Pet. 25.[23] Surely, respondents' victorious constitutional challenge to the law school's 1992 admissions policy, including the circuit court's pronouncements that the law school had failed to establish a compelling interest in justifying its policy, and that school's subsequent change in admissions practices constituted "the vindication of important rights" of the type that § 1988 was intended to support. *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (Section 1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making

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[23] Petitioners invoke this Court's decision in *Hewitt v. Helms*, 482 U.S. 755 (1987) to support their argument, but that case is inapposite. Pet. 26, 28. In *Hewitt*, the plaintiff was not a prevailing party, *see Hewitt*, 482 U.S. at 759-60, while in this case respondents indisputably are—as the district court expressly found. Pet. App. 241a.

attorney's fees available under a private attorney general theory"). In any event, the amount of the lower court's award of attorneys' fees cannot be said to be an abuse of discretion, and there is certainly nothing worthy of certiorari review about the award.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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